

NAVAL POSTGRADUATE SCHOOL

Monterey, California



THESIS

ANALYSIS OF GENERAL ACCOUNTING OFFICE, ARMED
SERVICES BOARD OF CONTRACT APPEALS AND
FEDERAL COURT OF CLAIMS DECISIONS ON
CONTRACT PROTESTS DISPUTES INVOLVING
PERFORMANCE SPECIFICATIONS

by

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September 2002

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<p>13. ABSTRACT (<i>maximum 200 words</i>) This thesis analyzed rulings and court cases from the General Accounting Office, Armed Services Board of Contract Appeals and Federal Court of Claims with respect to contract protests and disputes involving Performance Specifications.</p> <p>Performance Specifications generally leave the contractor open to decide the best means to accomplish the work of a contract and deliver the product called for in the contract. As compared with Design Specifications, which tell the contractor exactly the processes and materials that must be used to accomplish the task, Performance Specifications only specify the final product to be delivered and the parameters it will fulfill or operate within, and thus leave the contractor open to decide the best processes and procedures to accomplish the task.</p> <p>The use of Performance Specifications in the Defense acquisition process has been mandated from the Secretary of Defense since 1994. The intent in using Performance Specifications was to provide incentive to the contractor to become innovative and resourceful in performing the contract and hopefully, result in cost avoidances and savings to the Federal Government.</p> <p>This thesis will examine protests and disputes from the above sources to evaluate the use of Performance Specifications to date and compile any patterns of success or failure that can then be passed on to today's acquisition workforce.</p>				
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**ANALYSIS OF GENERAL ACCOUNTING OFFICE, ARMED
SERVICES BOARD OF CONTRACT APPEALS AND FEDERAL
COURT OF CLAIMS DECISIONS ON PROTESTS AND DISPUTES
INVOLVING PERFORMANCE SPECIFICATIONS**

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ABSTRACT

This thesis analyzes rulings and court cases from the General Accounting Office, Armed Services Board of Contract Appeals and Federal Court of Claims with respect to contract protests and disputes involving Performance Specifications.

Performance Specifications generally leave the contractor open to decide the best means to accomplish the work of a contract and deliver the product called for in the contract. As compared with Design Specifications, which tell the contractor exactly the processes and materials that must be used to accomplish the task, Performance Specifications only specify the final product to be delivered and the parameters it will fulfill or operate within, and thus leave the contractor open to decide the best processes and procedures to accomplish the task.

The use of Performance Specifications in the Defense acquisition process has been mandated from the Secretary of Defense since 1994. The intent in using Performance Specifications was to provide incentive to the contractor to become innovative and resourceful in performing the contract and result in cost avoidances and savings to the Federal Government.

This thesis examines protests and disputes from the above sources to evaluate the use of Performance Specifications to date and compiles any patterns of success or failure that can then be passed on to today's acquisition workforce.

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I. INTRODUCTION

A. PREFACE

1. Purpose

This research analyzes rulings from the General Accounting Office, Armed Services Board of Contract Appeals, and Court of Federal Claims where Performance Specifications and Standards were an integral issue in the dispute or litigation.

2. Benefits of Research

This thesis is intended to primarily benefit Department of Defense acquisition activities, in regards to the managing and drafting of performance specifications and standards. The critical review will facilitate acquisition decision-making regarding the most effective means of employing performance based contracting.

B. BACKGROUND

On 29 June 1994, then Secretary of Defense, William J. Perry, issued a Memorandum directing the use of commercial performance specifications and standards in lieu of military specifications and standards, unless no feasible commercial specification would suffice. [Ref. 9] Because of this change, the acquisition community was forced to develop new standards, processes and means of conducting business rather than just citing established, lengthy and somewhat cumbersome military specifications.

The use of performance specifications had the potential to cause some concern for the acquisition community as a whole. Chief among these was how the acquisition community was to draft performance specifications and standards without them becoming design

specifications and standards. The second problem was developing a methodology that would cover all the requirements of an acquisition without creating cumbersome requirements. The guideline was to tell the contractor what needed to be done but not how to do it. The goal was to adhere to the direction of Secretary Perry's Memo and to encourage innovation and new thinking from industry that would lower costs, produce better results and encourage innovation.

This thesis examines how the acquisition community responded to Secretary Perry's Memo by looking at the contract protest and dispute processes to analyze where performance specifications and standards have fallen short in achieving desired results. From this study, the researcher will provide recommendations for Government contracting personnel to use in drafting performance specifications and standards and managing performance-based contracts.

C. RESEARCH QUESTIONS

1. Primary Research Question

In what ways has the use of Performance Specifications resulted in contract protests, disputes and litigation in Federal contracting, and how can these decisions and rulings be used to eliminate problems with using performance specifications?

2. Secondary Research Questions

- a. What is the background and history of the directed use of performance specifications and standards?

b. Does there exist a commonality or trend in the protest and litigation of cases associated with using performance specifications? If so, what are the commonalities or trends?

c. What recommendations for changes can be made to enhance the use of performance specifications and standards in Federal contracting?

D. SCOPE

The scope of this thesis includes: (1) a historical review of performance specifications and standards and a comparison with current regulations and directives; (2) A review of Armed Services Board of Contract Appeals (ASBCA) cases involving performance specifications and standards since January 1995; (3) A review of General Accounting Office (GAO) protest decisions involving performance specifications since January 1995; (4) A review of Court of Federal Claims (CoFC) cases involving performance specifications since January 1995; and (5) A summary analysis of all cases that attempts to find any similarities in the cases mentioned above. 6) Finally, conclusions, recommendations for changes in the application of performance specifications and recommendations for further study are provided.

The scope of this thesis will not include agency protests even though resolution at the lowest possible level is the preferred method in all contract protests and disputes.

E. METHODOLOGY

The methodology used in this thesis research consists of the following steps.

1. Conduct a comprehensive literature search of thesis reports, Internet-based materials and other library information resources dealing with performance specifications and standards.
2. Review all cases from GAO, ASBCA, and CoFC since January 1995 dealing with performance specifications and standards.
3. Analyze all reviewed cases and collate common successes and failures of using performance specifications.

F. ASSUMPTIONS AND LIMITATIONS

This thesis is limited to protests and disputes that involve performance specifications as an integral element of the protest or dispute but not cases wherein design specifications should have been used instead of performance specifications. The rationale for this decision is that this research is focused on the application of performance specifications and the justification for their use.

This thesis analyzes only those cases that occurred from January 1, 1995 to January 1, 2002. The reasoning used for this decision is that performance specifications were not mandatory until July 1994, at which time training and indoctrination in their use was commonly available. The primary assumption in this study is that the reader is familiar with the basic Federal acquisition contracting process and the implications of using performance

specifications in lieu of design specifications. However, a brief overview of the acquisition process is provided.

H. ORGANIZATION OF THE THESIS

Following this opening chapter, Chapter II provides background on the evolution and development of performance specifications along with a brief history on their use. The contracting process is briefly reviewed along with a more in-depth discussion of the protest and dispute processes.

Chapter III focuses on a review of cases. First GAO protest decisions are reviewed. Next, ASBCA Cases are reviewed, and finally cases heard before the CoFC are reviewed.

Chapter IV focuses on case analysis and provides a summary of cases in which common trends between cases are presented and examined.

Chapter V provides conclusions, recommendations, and answers to the research questions and includes suggested areas of further research.

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II. BACKGROUND

A. INTRODUCTION

Chapter II provides the background and reference point from where case analysis will be done. In this chapter, the revolution to the mandated use of performance specifications in contracting is discussed. A brief history of acquisition reform and how performance based contracting became the contracting method of choice in today's acquisition environment is also presented. Additionally, the protest process is defined and discussed and details are given on how the protest process differs from the disputes process. Finally, the disputes process is examined through the various levels of Courts and the various triggering mechanisms that lead to each activity of the disputes process are detailed.

B. BACKGROUND: EVOLUTION OF PERFORMANCE SPECIFICATIONS AND HISTORY

In 1993, President William Clinton tasked Vice-president Al Gore with the responsibility for conducting a complete review of how the Federal Government operated and conducted business. Specific agenda items included identifying inefficiencies in the current systems that, when changed, could produce cost avoidances, savings and reductions in spending. The Department of Defense (DoD) was specifically targeted for a complete "bottom-up" review. From this review, the panel on the National Performance Review made specific recommendations that agencies "avoid Government unique requirements and rely more upon the commercial marketplace." [Ref. 9]

Immediately after this review, upon direction from Secretary Perry, the Deputy Under Secretary of Defense (Acquisition Reform) chartered a Process Action Team to make specific recommendations on how the DoD should proceed in the new acquisition environment. The Process Action Team Report entitled, "Blueprint for Change" created specific recommendations for implementing the use of commercial specifications and standards in DoD acquisitions. [Ref. 9]

In June of 1994, Secretary Perry issued a linchpin memorandum that changed acquisition and contracting and created fundamental changes in the ways in which industry and Government conducted business. In his memorandum to the Secretaries, Under Secretaries, and Agency Heads, Secretary Perry mandated that all DoD activities "use performance and commercial specifications and standards in lieu of military specifications and standards, unless no practical alternative exists to meet the user's needs." [Ref.9] Sweeping changes to a fundamental paradigm were implemented in a few short pages of direction to the DoD acquisition community.

C. DEFINITIONS

1. Performance Specifications

Performance specifications are, "Technical requirements that set forth the operational characteristics desired for an ITEM. They indicate what the final product must be capable of accomplishing rather than how the product is to be built or what its measurements, tolerances, or other design characteristics must be." [Ref. 8: p.394] In summary, Performance Specifications tell the contractor what is needed as to form, fit and function, and

do not specify exactly how to accomplish the task or make the product.

2. Design Specifications

Design specifications, "...set forth precise measurements, tolerances, materials, in-process and finished-product tests, quality control measures, inspection requirements, and other specific information." [Ref. 8: p. 185] In general, design specifications specify from start to finish how the item is to be built (including material composition and markings), tested, packaged and delivered.

3. Protest

"Protest," means a written objection by an interested party to any of the following:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract." [Ref 5]

D. THE CONTRACTING PROCESS

The Contracting Process can be represented by six interlocking phases. Figure 2.1 displays the Contract Process as a subset of the acquisition process. The process begins with the identification of a need. The need may have been identified as part of National Security Strategy development, such as in a new fighter aircraft, or it might be at the organizational level, such as requesting services to clean buildings or provide supplies. Regardless, the process begins with this identification of need. Once the need is identified and a material solution

to that need is determined to be required, the Acquisition Planning Phase can begin.

In Acquisition Planning, the organization decides upon the best course of action to pursue in solving the material need. Market research is conducted and alternative solutions are analyzed. The goal in this step is to identify already existing Commercial-Off-the-Shelf (COTS) material or services that can meet the need. During this phase, and concurrent with market research, the level of competition in the marketplace is evaluated to assist in determining the best method of contracting. Additionally, and if required due to threshold, pre-solicitation conferences and announcements in Federal Business Opportunities (Fed Biz Ops)(formerly Commerce Business Daily) are conducted and drafted. Finally, the best contracting method (sealed bid or competitive proposal) and contract specifics such as deliverables, dates of performance, and, again if necessary, source selection planning and evaluation criteria are decided upon and solidified.

The next phase, the solicitation phase, involves actual announcement and solicitation of the contract. As mentioned above, if the contract is over \$25,000 then announcement in Fed Biz Ops is required. Additionally, evaluation is needed if the contract will be Small Business Set Aside, sole source or if it falls into other socio-economic programs. The goal of the solicitation is to maximize competition and achieve widest dissemination to qualified responsive and responsible bidders and offerors.

The third phase in the contracts process involves evaluation of the potential sources depending upon responsiveness to the Invitation for Bid (IFB) or the Request for proposals (RFP). The Source Selection process can take many forms depending upon the complexity and dollar value of the procurement. Complex, high dollar value acquisitions may involve a Source Selection Authority (SSA), Source Selection Advisory Council and finally a Source Selection Evaluation Board. Most important in the phase is strict adherence to the Source Selection Plan (SSP) noted in the previous phase. Some criteria that the board or deciding authority should consider are price, schedule, past performance, responsiveness to the bid or proposal, responsibility for achieving the contract intent, competitive factors compared with other respondents and finally criteria as outlined in the SSP and called for in the IFB or RFP.

Once Source Selection is complete or the Competitive Range established, negotiations can take place. Again, negotiations can range from simple to complex depending upon the complexity and requirement of the solicitation. Negotiations can take place with all respondents in the competitive range for competitive proposal type solicitations. Once the final Source is selected, debriefings can take place. Debriefings allow unsuccessful offerors to gain an understanding of why their proposal was not adequate and can have training value in making unsuccessful offerors more competitive in future solicitations.

Finally, Contract Award takes place. Again, depending upon the dollar value of the contract and the potential oversight for some socio-economic programs, announcement of award in Fed Biz Ops or other approved announcement systems may be required. Lastly, the contract passes into monitoring, administration, and closeout upon successful completion of the contract terms and conditions.

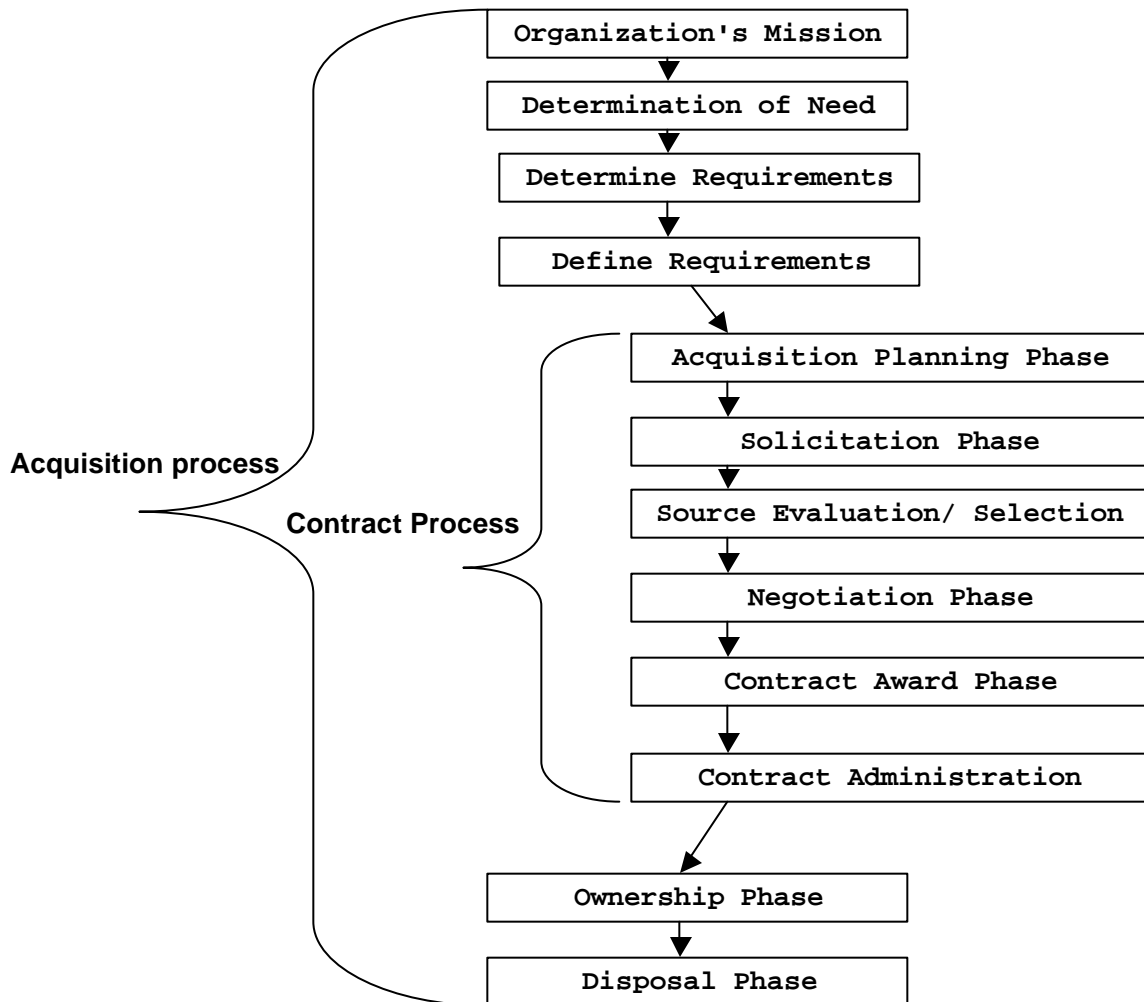


Figure 2.1: The Acquisition and Contracting Process [From: Ref. 6]

E. THE PROTEST PROCESS

A protest is a complaint by a contractor or interested party against a contracting agency alleging that the agency has failed in carrying out the contract process in a proper manner. Usually this complaint will involve allegations of procedural violations or claims of bias. Protests are filed with the GAO or an agency board with a copy filed with the contracting officer. As mentioned in Chapter I, the scope of this thesis will not include agency protests even though resolution at the lowest possible level is the preferred method in all contract protests and disputes.

Since 1984, with the inception of the Competition in Contracting Act (CICA), GAO has had responsibility for oversight of contract protests. Additionally, if the contractor believes the GAO decision was incorrect, he can appeal through the CoFC (a process which is discussed further on in this chapter).

The protest process was designed to be a simple non-administratively burdensome process for contractors to bring complaints in contracting to independent third party review. The process was instituted to ensure that illegal or questionable practices were brought to light, and to ensure that an environment of level competition was maintained for all who wanted to conduct business with the Federal Government. For the contracting officer, the process can be particularly onerous as there are reporting requirements and reviews that are conducted once a protest is filed, and the process may place the acquisition "on hold" pending resolution.

The process starts with the filing of a protest. The protest can be as simple as a letter to the GAO specifying a protest of award. The only requirements are that the protest:

- (1) Include the name, address, and telephone and facsimile (fax) numbers of the protester (or its representative, if any);

- (2) Be signed by the protester or its representative;

- (3) Identify the contracting agency and the solicitation and/or contract number;

- (4) Set forth a detailed statement of the legal and factual grounds of protest, including copies of relevant documents;

- (5) Set forth all information establishing that the protester is an interested party for the purpose of filing a protest;

- (6) Set forth all information establishing the timeliness of the protest;

- (7) Specifically request a ruling by the Comptroller General of the United States; and

- (8) State the form of relief requested. 4 C.F.R. § 21.1(c). [Ref. 2]

The letter can be mailed, faxed or hand delivered to the GAO in Washington, D.C. When deciding to file a protest, two significant considerations must be considered.

First, a person filing a protest must be an interested party. An interested party is defined as "an actual or prospective bidder or offeror with a direct economic interest in the procurement." [Ref. 2] The person must be able to prove some tie to the acquisition, such as showing how he would have benefited if the award had been handled differently.

Secondly, the protestor must submit the protest within certain time constraints. The general rule is that a protest must be filed within 10 days from when the protestor "knew or should have known the basis for the protest whichever is earlier." [Ref 8] Other rules are as follows:

1. Protests alleging improprieties in a solicitation must be filed prior to bid opening or the time set for receipt of initial proposals if the improprieties were apparent prior to that time. 4 C.F.R. § 21.2(a) (1).
2. A solicitation defect that was not apparent before that time must be protested no later than 14 days after the defect became apparent. In negotiated procurements, if an alleged impropriety did not exist in the initial solicitation but was later incorporated into the solicitation by an amendment, a protest based on that impropriety must be filed before the next closing time established for submitting proposals. [Ref. 2]

Once the protest is filed, the GAO conducts an initial evaluation of its merits and, if necessary, schedules and conducts hearings. Procurements that are under protest cannot be awarded and work may not proceed until the protest has been resolved. The GAO will decide protests within 100 days of the protest being filed.

F. THE DISPUTES PROCESS

The governing law dealing with contract disputes is the Contract Disputes Act of 1979 (CDA), 41 U.S.C 601-613. This act provides an avenue for contractors to bring claims against the Government involving disputes in contracts. The act provides the requirements, processes and procedures

that must be followed. The disputes process is displayed in Figure 2.2 below.

The disputes process begins with the filing of a claim by the contractor. "Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." [Ref 5] Claims over \$100,000 must be certified in accordance with FAR Part 33.207. Claims can be submitted within six years from the occurrence of the incident requiring the claim.

Once the claim is submitted to the Contracting Officer, he must decide how to handle the claim. The preferred method is to engage the contractor in discussions and resolve differences at the lowest possible level. If differences cannot be resolved, the Contracting Officer will issue his decision in a formal letter that outlines all pertinent facts, supporting documentations and rationale for the decision. Additionally, the letter must contain wording as outlined in FAR Part 32.11. The letter is referred to as the Contracting Officer's Final Decision (COFD).

The COFD must be issued within sixty days from the receipt of the claim for claims under \$100,000. For claim over \$100,000 the Contracting Office may take longer to decide, but must notify the contractor within 60 days of his decision to take additional time. Once the COFD is issued, the contractor must decide if he wants to continue the disputes process, or accept the COFD as resolution.

Appeals of the COFD can take two forms. First, the contractor can appeal to the ASBCA. Second, the contractor can file suit in the CoFC. At the ASBCA, the contractor can pursue Alternative Dispute Resolution (ADR) or request various types of hearings. ADR is a much abbreviated and less expensive approach for both the Government and the contractor to take. Each venue has much the same jurisdiction, but rules of evidence and formality of proceedings differ greatly from Agency Boards, ASBCA Hearings and ADR, to CoFC formal litigation. Each of these tracks is discussed below.

1. Armed Services Board of Contract Appeals

The ASBCA was established in May 1962. It was designed to hear appeals: "(a) pursuant to the Contract Disputes Act of 1978 (41 U.S.C. Sect. 601, et seq.), (b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board, or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure." [Ref. 1]

Appeals to the ASBCA must be filed with the ASCBA and a copy sent to the Contracting Officer no later than 90 days from receipt of the COFD. Appeals can take any form but must conform to the following requirements:

A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and/or agency involved in the dispute the decision from which the appeals taken, and the amount in

dispute, if known. The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), by the appellant's duly authorized representative or attorney. [Ref. 2]

Once the notice of appeal is filed and docketed (assigned a number) by the ASBCA, the appellant has thirty days to file the detailed complaint or pleading with all pertinent information. The Government will, in turn, file a reply to the complaint within thirty days after receipt of the complaint. The reply must address each specific allegation of the appellant, either denying or affirming each and present the proposed defense, matters of law and any other relevant information. Finally, within thirty days of docketing notice, the Government is required to submit to the ASBCA a Rule 4 File, which generally consists of:

- (1) The decision from which the appeal is taken;
- (2) The contract, including pertinent specifications, amendments, plans, and drawings;
- (3) All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;
- (4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and
- (5) Any additional information considered relevant to the appeal. [Ref 2]

The Contract Disputes Act of 1978, 41 U.S.C. § 607, states that boards of contract appeals "shall provide to the fullest extent practicable, informal, expeditious,

and inexpensive resolution of disputes." [Ref.2] Dispute resolution at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. To this end, the ASBCA has created ADR procedures. Both parties must mutually agree upon ADR. Some more prevalent types of ADR include:

1. Settlement Judge: A settlement judge is an administrative judge or hearing examiner who will not hear or have any formal or informal decision-making authority in the appeal and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the settlement judge. The agenda for meetings with the settlement judge will be flexible to accommodate the requirements of the individual appeal. To further the settlement effort, the settlement judge may meet with the parties either jointly or individually. A settlement judge's recommendations are not binding on the parties.

2. Mini-trial: The mini-trial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence in accordance with their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating a settlement. The procedures for each mini-trial will be designed to meet the needs of the individual appeal. The neutral advisor's recommendations are not binding.

3. Summary Trial: With Binding Decision: A summary trial with binding decision is a procedure whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. A summary, "bench" decision generally will be issued upon conclusion of the trial or a summary written decision will be issued no later than ten days following the later of conclusion of the trial or receipt of a trial transcript. The parties must agree that decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders have no precedential value. The length of trial and the extent to which scheduling of the appeal is expedited will be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

4. Other Agreed Methods: The parties and the Board may agree upon other informal methods, which are structured and tailored to suit the requirements of the individual appeal. [Ref. 2]

If ADR is not the choice for dispute resolution, then normal procedures of the ASBCA come into effect. Once all documentation has been submitted, the ASBCA decision process includes discovery, subpoenas, motions, conferences and formal hearings. If ADR is not chosen, the following abbreviate proceedings are also available:

1. Submission without a Hearing: Either party may elect to waive a hearing or to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses' Affidavits, depositions, admissions, answers to

interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submissions to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

2. Expedited Procedures: In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure.

3. Accelerated Procedures: In appeals where the amount in dispute is \$1 00,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. [Ref.2]

Appellants may also file a motion for summary judgment, where the facts of the case are not called into question and the decision is based upon the written submission of records. If summary judgment is denied, the case goes before the board for decision. After the decision is issued, either party can submit a motion for reconsideration to the board within thirty days. If either party is still not satisfied, or if the appellant decides to sue, that suit or appeal can be brought to the CoFC. Submission to the CoFC involves legal proceedings that are not within the scope of this thesis, but CoFC cases are reviewed for content dealing with performance specifications.

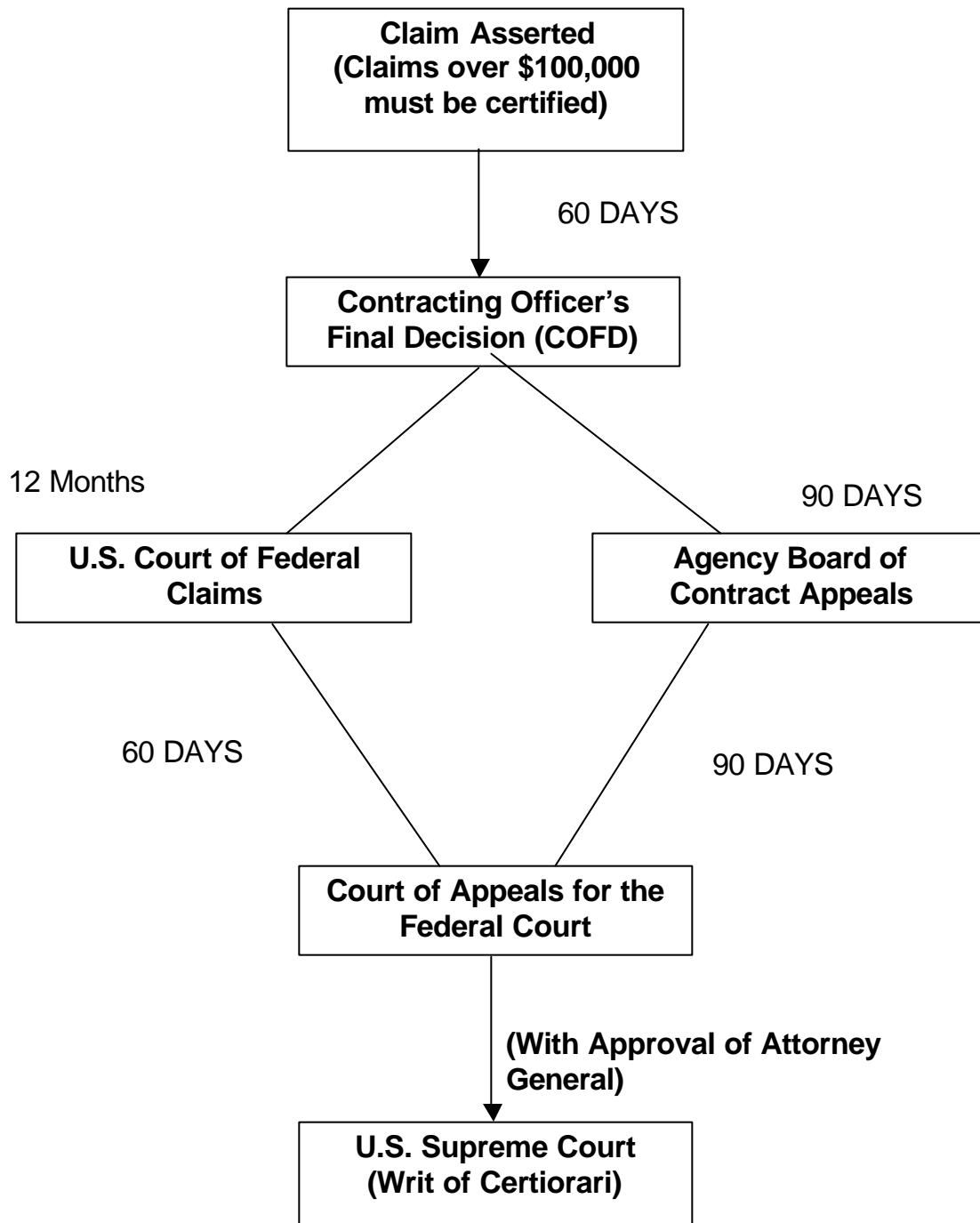


Figure 2.2: Disputes Process [From: Ref.7]

G. CHAPTER SUMMARY

This chapter provided a brief overview of the contracting process by breaking it into five distinct steps that a representative acquisition passes through.

Additionally, this chapter reviewed the Protest and Disputes process and described certain activities that take place in each process including ADR, expedited and accelerated procedures. Finally, this chapter highlighted several avenues open to a contractor to bring disputes and claims against the Federal Government. These avenues involve varying degrees of complexity from the more complex and expensive to the simple and relatively inexpensive.

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III. CASE REVIEW

A. INTRODUCTION

This chapter outlines the cases that were reviewed from the GAO, ASBCA and CoFC. Only cases that dealt with specific performance specification issues are summarized, analyzed and presented. For the purposes of this chapter, specific elements of the cases, as outlined below, are presented. Case commonalities are discussed in Chapter IV.

B. DATA COLLECTION

Cases were drawn from accessing Lexis-Nexis with the following search criteria and results:

Lexis-Nexis Library	Search Criteria	Results
Comptroller General LIBRARY: MILTRY FILE: COMGEN	Performance Specification* AND date > January 1, 1995	20 Cases
Armed Services Board of Contract Appeals LIBRARY: MILTRY FILE: ARMSER	Performance Specification* AND date > January 1, 1995	36 Cases
Federal Court of Claims LIBRARY: MILTRY FILE: CLAIMS	Performance Specification* AND date > January 1, 1995	69 Cases

Table 3.1: Summary of Data; Developed by the researcher.

As can be seen from Table 3.1, there were 125 cases drawn from the Lexis-Nexis Database. Lexis-Nexis is an online repository of legal cases heard through all levels

of the United States Court System and Boards of appeal. Lexis-Nexis is widely accepted as a highly reliable and exhaustive research tool for legal cases, current events and other information necessary to the professional data researcher. The cases selected for this thesis represent over 1500 pages of case material that had to be carefully reviewed for relatedness to the thesis focus.

Each case was reviewed in order to decide if the case dealt with a salient Performance Specification issue or if the case was presented from the database for the sole reason that it mentioned part of the search criteria "Performance Specifications." While some cases were self evident from reading the header notes many cases had to be completely reviewed and evaluated. In order to track cases and at the same time capture notes, the researcher developed an Access database that enabled some degree of ease in collating information. The following categories of data notes were taken:

- **Agency-** GAO, ASBCA, CoFC
- **Contracting Agency-** Army, Navy, Air Force, etc.
- **Case Number-** Docketed Number
- **Case Name**
- **Type of Contract-** Construction, Supplies or Services
- **Nomenclature of purchase**
- **Type of Claim-** Equitable Adjustment, Appeal of COFD, etc.
- **Outcome-** Sustained, denied

- **Government Issue-** Government opinion as presented
- **Contractor Issue-** Contractor issue as presented
- **Salient Issue of Opinion-** Ruling activity opinion
- **Researcher Notes**

The case review of 125 cases revealed only twenty-one cases in total that dealt specifically with issues relating to the use of performance specifications. Of these, eight were from the GAO, eleven were from the ASBCA, and the remaining five were from the CoFC.

C. GENERAL ACCOUNTING OFFICE PROTEST CASES

1. Matter of: Daniel Technology Incorporated. B-288853, December 13, 2001

This protest involved the use of performance specifications to purchase modified Sony MiniDisk recorders. The recorders were commercial-off-the-shelf but required modifications for specific purposes as requested by the Navy. In this case, the Protestor knew he was the only one that could perform the modifications and provide the accessories. The Protestor had no intention to sell the modifications to the successful offeror (Mineroff) and protested the award of the contract.

The protestor's argument was that Mineroff could not meet the requirements of the offer because the Daniel did not intend to provide its equipment to Mineroff. The proposals contained the same performance specifications (photocopies of each other) and both met the broad performance specifications of the proposal. The Protestor conceded that his performance specifications were not

proprietary. The GAO held that whether or not Mineroff was able to deliver the required units is a matter for Contract Administration and not a basis for protests. The protest was denied.

While this protest was denied because actual performance is not a matter for the GAO to decide, the acquisition probably could not be fulfilled because the Protestor had no intention of selling the required accessories to Mineroff to complete the contract. Unless Mineroff was able to develop different equipment that still met the contract, it would have needed to be re-competed. While using broad performance specifications fosters greater competition, it can lead to problems when only one source is able to fulfill the contract.

2. Matter of: Signals and Systems Incorporated, B-288107, September 21, 2001

In this case, the protestor's (Signals and Systems incorporated) main argument was that the Army failed to adequately plan for the procurement and caused a situation of compelling urgency and sole source procurement in awarding a contract to KDS controls Incorporated. Additionally, the protestor claimed the Army purchased more than what was required to meet its immediate needs for HMMWV engine electrical start systems.

The Army took nearly two years to draft a performance specification to meet this second non-competitive acquisition, and when faced with an immediate need procured twice as many systems as what was required to meet its urgency. The protestor claimed that the Army failed to plan for this acquisition and failed to meet competition requirements. While the GAO was clear to make a

distinction between urgency for safety of personnel, it sustained the protest because the Army went above and beyond what was immediately required.

The two salient issues here were performance specifications and procurement planning. Dealing solely with performance specifications issues, this case represents how the Army put itself in a situation of exigency by using performance specifications. The Army used the excuse of not having an adequate performance specification to back-up its claim of urgency. Use of performance specifications and the inability to draft an acceptable performance specification should not be an excuse for sole-source or urgent procurements.

3. Matter of: Ellicott Engineering Incorporated, B-282382. June 23, 1999

In this protest, the protestor, Ellicott Engineering Inc., submitted a bid for chain to be used in dam gates. The Invitation for Bid (IFB) clearly laid out requirements to be followed including a requirement that materials conform to an industry standard (ASTM). Ellicott Engineering submitted a bid with substituted material, and made this protest on the assumption that it was the Government's responsibility to prove his material did not meet the performance requirements of the specification.

The GAO held that the substitution was substantial enough to warrant a finding of non-responsiveness. Additionally, the GAO held that it is the contractor's responsibility to prove that substituted material will meet requirements and not the Government's responsibility.

The protest was denied and the bid was upheld as non-responsive. While performance specifications are meant to increase contractor innovation to meet requirements, the contractor still maintains the responsibility for proving he has meet all requirements of the solicitation.

**4. Matter of: Chadwick-Helmuth Company
Incorporated, B-2796721.2**

In this case, the protestor, Chadwick-Helmuth, protested an overly restrictive Request for Proposal (RFP) for a Navy procurement for software. The protestor claimed that the performance specifications were unrealistic as written and not able to be accomplished. Specifically, the contractor claimed that a requirement for 100% compatibility with all other systems being run was not accomplishable.

The GAO agreed with the contractor in this case. The performance specification was poorly written and was overly restrictive. Additionally, the requirement was written so that only one company, the incumbent contractor, would be able to satisfy all the requirements of the solicitation. Performance specification should be written in a manner in which competition is excluded. Additionally, the GAO upheld the principle that restrictions can only be up to the agency's needs and not exceed what is actually required.

5. Matter of: Caswell International Corporation, B-278103, December 29, 1997

The protestor, in this case, protested the award of a contract for target equipment. The protest was based upon many of the same arguments held in the above case. Caswell claimed that the requirements were overly restrictive and

excluded competition. The Government maintained that the requirement for 100% interoperability with existing equipment was a safety issue and necessary for deployment and training concerns.

The GAO evaluated the Army's requirement for 100% interoperability as a necessary concern and denied the protest. The Army argued that if it were to deploy with non-interoperable equipment, it would not be able to perform crucial training needed for mission readiness.

Once again, the key requirement is that the restrictions can only meet the agency's need and not exceed it. In this case, even though competition was stifled, the restrictions were necessary for operation with already existing equipment.

6. Matter of: Henschel Incorporated., B-275390.5., May 14, 1997

In this case, Henschel Inc., initiated a protest of award for a Digital Air Flow Panel procured by Defense Logistics Agency. The proposal specified a brand name part, but allowed for brand name or better. The protest was initiated because Henschel believed that the winning offeror failed to technically prove that its supplied part met all performance specifications and also beat Henschel's panel.

The GAO upheld this protest on the basis that DLA failed to prove that the winning offeror's panel could meet or exceed Henschel's panel. Additionally, upon investigation, the GAO determined that the winning panel could not meet the performance specifications and was inferior to the Henschel part specified in the proposal.

In this case, the GAO upheld that offerors must provide proof that their proposals meet performance specifications even when the specification specifies "brand name or better."

D. ARMED SERVICES BOARD OF CONTRACT APPEALS DISPUTES

1. Matter of: Stemaco Products Incorporated. Case # 51599, August 20, 2001

In this case, Stemaco Products Incorporated, a manufacturer of Kevlar Helmets, requested an equitable adjustment for adding additional layers of Kevlar to helmets in order to exceed performance specifications. The contractor chose not to use another subcontractor that had a proven method for layering Kevlar but chose to add additional layers to achieve an additional margin of safety with the performance specifications.

The Board held that since the design could be proved to meet performance specifications if the alternate method was used, Stemaco's choice to use an alternate method placed financial liability on the contractor and not on the Army. Stemaco also contended that the design specifications were ambiguous in stating a "not less than" amount of layers for the helmet. However, the Board maintained that because the design could meet performance requirements, the contractor remained liable for additional costs. The request for equitable adjustment was denied.

2. Matter of: M.A. Mortenson Company, Case # 53062, August 17, 2001

In this case, the contractor requested an equitable adjustment for correcting problems related to planted trees not flourishing. The contract contained a mix of performance specifications and design specifications. The

performance specifications required the trees to flourish over a certain period. The design specifications detailed how the trees and substrata would be planted and constructed. The cause of the trees not flourishing was linked to poor drainage, which in turn was linked to compacted substrate in accordance with the design specifications. Further, the contract only specified that the contractor would "propose" a solution but not actually carry it out.

The root cause of this case was that the design specification as written eventually precluded the fulfillment of the performance specification. The compacted substrate prevented proper drainage and eventually the trees did not flourish. As discussed in Chapter IV, when the Government specifies the design, the Government also warrants that design. Additionally, because the contract specified that the contractor would "propose" a solution, the Army was liable for the additional costs. The case was sustained, in this part, for equitable adjustment.

3. Matter of: Edsall Construction Company, Case # 51787, May 21, 2001

In this case, the Army issued a design for canopy tilt doors for an aircraft storage hangar and the respondent submitted his proposal in accordance with the design. However, prior to performance, the contractor discovered that the design would not meet performance specifications and the design would require additional work. Edsall requested equitable adjustment due to the extra work required to correct the design. The Government claimed that it issued the design with the disclaimer that the

contractor was to propose a design that would meet performance specifications.

The Board held that even though the Army issued the design with the disclaimer, the Army was still responsible for the extra work required to meet the stated performance specifications. The Board found that the design was defective from the start and would not meet performance requirements as stated. The Board held that the Government was responsible for the equitable adjustment.

**4. Matter of: Nomura Enterprises, Incorporated,
Case # 50959, November 15, 2000**

In this case, the contractor, Nomura Enterprises Inc., was required to submit First Article Test (FAT) steel pallets in order to facilitate testing and certification of the pallets. Nomura claimed that Government specifications were not clearly stated and that the pallets submitted passed the performance test as stated in the contract.

The Board agreed with Nomura in that the Government performance tests were outside the performance specifications as specified in the contract. Additionally, the Board held that the design as given to the contractor did not meet the performance requirements of the end product. The Government failed to understand the full performance requirements. The Board sustained the appeal and converted the termination for default to a termination for convenience.

**5. Matter of: ABS Baumaschinenvertrieb GmbH., Case#
48207, August 29, 2000**

In this case, ABS was contracted to deliver a coal crusher to the Army that met certain performance requirements and complied with design characteristics. ABS

performed by delivering a coal crusher, which it claimed would meet the performance requirements even though it would not meet the design requirements. ABS maintained that the Government's design would not satisfy the performance requirements. The contract was terminated for default.

The Board held that the Government failed to issue requirements in a proper manner and that the requirements as issued were ambiguous and did not meet the performance criteria. There were other issues related to procurement integrity in this case, but the salient performance specification issue was that the Government design would not meet the performance requirements. The contract was converted to a termination for convenience.

**6. Matter of: Overstreet Electric Company
incorporated, Case# 51823, September 28, 1999**

In this case, the contractor, Overstreet Eclectic Company, Inc., requested an equitable adjustment for the additional cost of field testing switch gear that it installed for the contract. Overstreet claimed that the contract called for the installation of switch gear but did not have a requirement to make the switch gear operational. Additionally, the contractor claimed that the switch gear was already tested at the manufacturer and was not required to be tested again.

The Board held that the claim was frivolous and denied the request. The Board held that Overstreet's interpretation was unreasonable. Even though the contractor did not include the costs of testing in the bid, the Board held that testing after installation was a reasonable requirement to be understood. That the switch

gear was already tested at the manufacturer was irrelevant, as Overstreet did not know the manufacturer at the time of bid.

7. Matter of: FSEC Incorporated, Case# 49509, July 28, 1999

In this case, the contractor, FSEC Inc., was contracted to construct blast rooms with a specified number of fans and airflow. The specifications were stated in performance terms. The Government claimed that it specified four fans were to be used in order to achieve the requested 100 cubic feet per minute airflow without putting fans in serial condition. FSEC counterclaimed that once the material to be removed from the rooms was identified, he was free to alter to design as long as performance requirements were achieved.

The Board held that the Government requirements were unambiguous in specifying two fans and two dust collection systems per room. The Board also held that the contractor had the responsibility to clarify these issues with the Navy prior to installation. The Request for an equitable adjustment was denied.

8. Matter of: Poly Design Incorporated, Case# 48591, August 8, 1997

In this case, the contractor, Polygon Design Inc., appealed a termination for default in failing to complete delivery of dry nitrogen storage cabinets (DNSC). Polygon maintained that the cabinet design the Government requested would not meet performance requirements in that the Government requirements for a leak-proof seal were not attainable. The Navy terminated the contract, reprocured the item after relaxing the requirements, and sought

reprocurement costs. Polygon requested a summary judgment. Summary judgments can only be granted when there are no disputes of fact. The Board held that there was disputes and denied the request. However, this case again represents a situation where stated design does not meet performance specifications.

Polygon called numerous experts to testify that the given design would not meet performance criteria, but with additional latches and seals, Polygon could modify the DNSC to achieve stated performance. The Government was unwaiverable on the issue of design and pursued the termination for default. In reprocurement, another manufacturer was also unable to achieve performance but received a waiver rather than termination.

**9. Matter of: GKS Incorporated, Case# 45328,
November 30, 1995**

In this case, the contractor, GSK Inc., requested an equitable adjustment for a change in Government design. In the original contract, the Army requested a folding antenna that would fit into a standard duffel bag. As designed, the contractor could not meet the performance specifications. When a change was proposed by the contractor and accepted by the Government, a fixed price modification was incorporated. The change called for the use of a new material that would then enable the antenna to meet performance requirements.

The Board held that when the contractor proposed a change in design, it also warranted that design and agreed to the price as indicated in the fixed-price modification. The warranty for performance using a new design shifted

from the Army to the contractor. The request for equitable adjustment was denied.

**10. Matter of: Tom Shaw Incorporated, Case# 28596.
January, 18 1995**

In this case, the contractor, Tom Shaw Inc., was contracted to produce a cement slurry wall. The contract was poorly written and did not completely describe the type of slurry mix to use. The contractor interpreted the requirement as a performance specification and proposed his own mix of slurry. The Army disagreed that the proposed mix would meet requirements and ordered a work stoppage that subsequently caused additional cost.

The Board held that the requirements for the slurry mix were poorly written and open to interpretation. Additionally, the Board held that while the Government can stop work and specify the mix to use, it was liable for the additional costs of the mix and the work stoppage.

E. COURT OF FEDERAL CLAIMS CASES

1. Matter of: PCL Construction Services. Case# 95-666C, September 20, 2000

In this case, the contractor, PCL Construction Services, was contracted to construct a visitor's center for a national park. The contractor claimed that the Government had warranted the design to performance parameters and that the design was significantly flawed enough to prevent full performance compliance.

The Board held that the design contained both performance and design specifications and that the contractor was required to make changes to meet the performance parameters by the contract. Additionally, because there were ten other respondents to the RFP the

design could not have been as significantly flawed as PCL maintained. The claim for equitable adjustment was denied.

**2. Matter of: Fru-Con Construction, Case# 97-43C,
October 30, 1998**

In this case, the contractor, Fru-Con Construction, requested an equitable adjustment for over blasting clean up after it completed blasting services for the Army Corps of Engineers. The contractor claimed that when the Government specified what characteristics a good blasting plan would contain, it also warranted the plan.

The Board held that the contractor was free to deviate from the blasting plan and that there was no implied warranty. Additionally, the Board focused on how the contractor had demonstrated intricate details of the blasting plan; therefore, it was responsible for the over blasting costs. The request for equitable adjustment was denied.

F. SUMMARY

This chapter outlined the data collection methodology used, and provided a brief overview of cases that dealt specifically with performance specification issues. An in-depth analysis of the data in this chapter is presented in Chapter IV.

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VI. CASE ANALYSIS

A. INTRODUCTION

This chapter provides an in-depth analysis of common themes of the cases presented in Chapter III. With the population of cases being extremely small (only 18 of 125 cases directly relating to performance specifications) there were no statistical numbers that would lend to any meaningful trend analysis of the cases. Rather, recurring themes from all cases as an aggregate are organized, presented and analyzed. The themes that the researcher believes are relevant to the thesis topic are presented below.

After careful analysis of all cases, three themes emerged from the review. All cases are grouped into one of these three major themes and presented in the following pages. First, disputes and protests occurred when a mix of design specifications and performance specifications were used. Specifically, protests and disputes arose when stated contractual performance specifications could not be achieved with the detailed design specifications of the contract.

Second, the use of commercial performance specifications to draft contractual agreements led to protests and disputes. Specifically, protests and disputes occurred when the Government or contractor accepted or used published performance specifications from the commercial marketplace.

Lastly, protests and disputes arose from poorly written or unachievable performance specifications.

Each of these situations will be examined in-depth below. Specific cases and remarks from the GAO, ASBCA and CoFC are used to bolster the general categories used above as well as some precedence setting cases cited in the text of the cases themselves. Arguments are based on recurring themes regardless where the protest/case was heard (GAO, ASBCA, CoFC). The reader is reminded that each case was presented in Chapter III, and will only be briefly refreshed here in Chapter IV.

B. CASE ANALYSIS

1. Disputes and Protests Involving a Mix of Performance and Design Specifications

In many procurement actions, the Government is unable to clearly specify the requirements without the use of design specifications. While the use of performance specifications is mandated, there are still exceptions and waivers granted depending upon the circumstances and the procurement actions. For example, in construction procurement, the design of the building constitutes a design specification. Additional performance specifications might be used to clearly specify the operational characteristics of the building (airflow, energy efficiency, able to withstand gale force winds, etc...). Prior to examining this particular theme the concept of the Spearin Doctrine must be detailed.

United States v. Spearin is the seminal case in this area and was heard before the Supreme Court of the United States in 1918. [Ref. 12] Spearin Construction was contracted to build a dry-dock at the Brooklyn Navy Yard in accordance with plans that were drawn up and prepared by the Government. An integral part of the contract involved

the relocation of a sewer pipe, which Spearin accomplished in accordance with the drawings. When a seasonal flood occurred, the excavated dry-dock flooded. Spearin refused to continue work until the Government solved the problem of the sewer. Additionally, Spearin believed the issue to be a significant safety for his equipment and men.

The Government refused to fix the problem with the sewer citing that the contractor was responsible for any corrections necessary. Spearin disagreed arguing that he had carried out the construction in accordance with the plans provided by the Government. After a delay of fifteen months, the Secretary of the Navy annulled the contract and took possession of all material and plant equipment at the site. Although Spearin was awarded lost profits and costs at a lower court, Spearin appealed the case to the United States Supreme Court.

The Court held that, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." [Ref. 12] This rule applies even if the contractor is required to conduct a site inspection prior to entering into the contract or commencing construction. In summary, when the design is specified, the design carries an implied warranty that it will meet the performance requirements. Specific examples are provided from the case reviews in Chapter III.

**a. Matter of: Stemaco Products Incorporated,
Case # 51599, August 20, 2001**

This case involved the purchase of Kevlar helmets for the Army. The contractor requested an equitable adjustment for additional costs related to meeting performance criteria established by the Army. The contractor asserted that the given design specification from the Government would not meet the performance requirements of the contract. The assertion was based upon a failure when the helmet was subject to live-fire testing. The contractor was able to meet the live-fire test requirements when he used an alternate method of manufacturing. Rather than choose this option, he chose instead to add additional layers of Kevlar to the helmets to meet testing requirements and provide for a degree of certainty that the helmets would not fail during live-fire testing. At this point, the contractor deviated from the design specifications to achieve a level of performance greater than the performance specification. This choice was made to avoid the possibility of additional cost for failed lots.

The central issue in this case revolved around the Government specifying the design and the performance requirements. While the contractor was able to meet performance criteria with the stated design, it was only after going with a different layering technique and sub-contractor than what the contractor was normally accustomed to doing. In this case, performance and weight were the critical factor of the design. The contractor met both criteria, but additional costs for extra layering ensued.

The ASBCA held that "The Government is not liable for added costs resulting from business decisions of the contractor." [Ref. 13] The Government would have been better served in this acquisition to only specify weight and performance criteria (salient requirements) and not require the contractor to meet design criteria. The central goal of performance specifications is to allow the contractor enough latitude to achieve results with innovation and lower costs.

b. Matter of: M.A. Mortenson Company, Case # 53062, August 17, 2001

This case involved a construction contract for a new medical facility. The contract was completed on time, but several issues remained to be resolved. The contractor requested an equitable adjustment due to additional costs related to correcting tree planting and tree growth problems. In this case, the Government specified **How** trees were to be planted in the area specified.

The performance part of the requirement stated that the trees had to flourish for a certain period, and if the trees did not flourish, that the contractor had to correct the deficiency. The design portion of the requirement specified **How** the substrate would be prepared and the layering techniques to use. The trees were planted as specified, but when water began to accumulate the as-prepared substrate would not allow for drainage of the water.

The contractor performed to the design (preparation of substrate and planting of the trees), but the design would not allow for performance (seasonal growth). The situation was further exacerbated by a poorly

written corrective action paragraph that only required the contractor to "**propose**" a solution. When the planting was complete, the Government expressed no objections or concerns because the problems with growth did not occur until later in the season.

The ASBCA held that:

Requirements pertaining to the subject trees combine aspects of performance specifications, which generally set forth an objective or standard to be achieved, leaving the contractor to determine the method or means of achieving the required result, and design specifications, in which the Government details the material and manner or method in which the contract is to be performed. The general rules for proof of defective specifications are well settled. Where the Government has specified the manner in which work is to be done, it warrants the outcome. [Ref. 14]

In this case, the contractor correctly held that it was the design of the substrate that caused the poor drainage and the failure of growth. It is unknown if the drainage problem could have been foreseen. However, it is abundantly clear that the Government over-specified how the trees were to be planted and should have left the details of planting (hole size, depth, etc.) to the contractor. Once the Government specified these characteristics, the Government warranted the design to achieve the performance.

***c. Matter of: Edsall Construction Company,
Case # 51787, May 21, 2001***

This case involved the purchase of tilt-up canopy doors for an aircraft storage hangar. The Government issued the solicitation with drawings that were evaluated to later be defective. The Government used a design specification for the tilt-up canopy doors in its proposal

that would not meet the performance specifications of the solicitation. The ASBCA held that:

If the number of pick points and the requirement to distribute the load to three points on the truss were not design specifications because of the disclaimers as the Government asserts, there would be no reason for the note on drawing S13, because bidders would have been free to select the method of performance, and it would not have been necessary for them to seek the architect's permission to make changes from the plans. [Ref. 15]

Once this problem was discovered, the contractor requested an equitable adjustment for the new design.

The ASBCA held that "it is settled that a contractor is not obligated to inspect the Government's specifications and drawings to ascertain their accuracy and ferret out hidden ambiguities and errors in the documents." [Ref. 14] In this case, the Government should have never issued drawings that it knew would not meet performance requirements. If the Government wanted the contractor to propose a new design, the solicitation should have specified a design requirement.

d. Matter of: Nomura Enterprises, Inc, Case #50959, November 15, 2000

This case involves the purchase of steel cargo pallets. As part of the contract, the contractor is required to submit several pallets for First Article Testing (FAT). This case again represents how Government imposed design criteria did not meet stated contractual performance parameters. However, this case also combines elements of poor writing, which also contributed to the dispute. As the ASBCA held, "At the outset we must state the specification is not a paragon of clarity but rather a

hodgepodge of revisions and changes resulting in a burdensome, confusing and equivocal set of instructions for the pallets." [Ref. 16]

At the center of this case is a contractual agreement to conduct FAT. FAT tests were specified using Military Standards (Mil-Std) and Specifications. The contract was terminated for default when the performance of the pallets did not meet the requirements of the Mil-Std tests. Two issues were found salient.

First, the Government failed to conduct the test in accordance with the cited Mil-Std. Tests were conducted outside of the requirements of the standard and this caused the performance of the pallets to fail. Second, the Government failed to understand all the design and performance specifications. When using both design and performance specifications, it is paramount for the contract designers to understand that the specifications must function together.

e. Matter of: Poly Design Incorporated, Case# 48591, August 8' 1997

This case involved the manufacture of Dry Nitrogen Storage Cabinets (DNSC) for the Navy. The Navy solicited a design and a performance requirement for the DNSCs. The Government had requested DNSCs that were able to be leak proof up to 1.00 Pounds for Square Inch (PSI). While this case was dismissed on other grounds, it is indicative of cases in which performance specifications are not matched with design specifications and the Government ties the hands of the contractor to adequately perform the contract.

In responding to the show cause letter from the contracting officer, Poly Design incorporated (PDI) responded "providing a leak-free seal complying with specification P 3.2.1.4 for the DNSC as designed by the Navy was unattainable, and PDI had exhausted every technique it knew to obtain a leak-free seal." [Ref. 17] PDI also provided another design with additional latches and seals that would be able to achieve the desired results. The Navy balked at the new design and terminated the contractor default.

In a re-procurement action, the Government allowed another contractor to modify the design and waived the 1.00 PSI requirements, as the contractor was only able to achieve .9 PSI. In this case, the Government would have been better served to work closer with the contractor to complete the contract, and contract specifications should have been better reviewed to ensure they could meet performance requirements. The best alternative would have been for the Government to follow stated performance specification guidance, tell the contractor what was needed, and leave the design to the contractor.

f. Matter of: GKS Incorporated, Case# 45328, November 30, 1995

This case involved the purchase of a radio whip antenna for the Army. One of the requirements for the antenna was that it would fold and fit into a pre-designed storage bag. When the original design was found to be non-compliant, in that the antenna would not fit into the duffel bag, GKS proposed the use of a special material for the antenna. A firm-fixed price change was negotiated and incorporated. However, when GKS experienced additional

costs associated with the use of this special material, they request from the Government additional funding for increased costs relating to the use of the material. At the crux of this case, is the issue of who has responsibility for the costs of design meeting performance?

The ASBCA held that when the Government specified the design, it warranted that performance would be achievable. However, when the contractor proposed the design change, the responsibility shifted to the contractor and he bore the burden of additional costs. In this case, the contractor knew of the additional requirements of special material beforehand and should have factored in these costs before signing the agreement. In summary, while the design could not meet stated performance requirements, once the contractor proposed and both parties accepted the change, the contractor bore the responsibility for warranty of the design.

g. Matter of: PCL Construction Services. Case# 95-666C. September 20, 2000

At the core of this case is a construction project for a visitor's center and parking structure in an extremely difficult, relatively restricted and remote access location. The site for construction was located in a rocky ravine with unknown geological conditions. The contractor is submitting a claim based upon the Government's termination for default and alleging breach of contract due to multiple changes in design. The Government refused to provide for an equitable adjustment, and denied the claim for reversal of the termination for default.

The contractor claimed that over 144 modifications to the contract and numerous Requests for

Information (RFI) led to a breach of contract. Additionally, the contractor claimed that the Government proposed a faulty design and had superior knowledge. However, the Government was justified in this action through open communication with the contractor and full and open competition of the project. The Court of Claims specifically noted that there were over ten respondents to the solicitation.

The cases cited by the plaintiff refer to the Government's obligation to consider competitive bids fairly or to act in good faith during contract performance. In fact, many contracts involve performance difficulties, requiring revision of the specifications and redesign efforts, without resulting in a breach of contract. Even if an obligation to assemble a close-to-flawless bid package existed, PCL would still face the burden of demonstrating that USBR breached such a duty and acted in bad faith. Agency employees are presumed to act in good faith, and a claimant must present "well-nigh irrefragable proof" of bad faith to overcome that presumption. [Ref. 18]

The Court of Claims further noted that:

It is also well-established that a contractor cannot prevail by showing that the specifications were less complete than it would have preferred. The courts and boards of contract appeals have repeatedly rejected the notion that the Government is liable for difficulties encountered by a contractor because performance specifications supplied by the Government were insufficiently detailed to enable the contractor to perform the contract in an efficient or profitable manner. [Ref. 18]

In this case, the Government would have been served through a design-build approach with performance specifications rather than the Design-Bid-Build methodology

that was used. In a design-build environment, one contractor assumes all responsibility for the design and construction. With this type of acquisition strategy, there is a lesser likelihood that disputes will arise over changes in design. This case again represents how mixing of design and performance specifications can lead to contract disputes. Finally, the Court of Claims held that:

It is evident to the court that the portions of PCL's contract at issue were performance specifications, or a mix of design and performance specifications, but not exclusively design specifications, which carry with them an actionable implied warranty. The contract required PCL to perform some design work itself including permanent features such as the theater turntable in the visitor center. Many specification and drawing provisions demonstrate that PCL was permitted and expected to exercise its discretion and judgment in designing and building substantial portions of the project. [Ref. 18]

h. Matter of: Fru-Con Construction. Case# 97-43C, October 30, 1998

In this case, the Government contracted with a Fru-Con Construction to perform blasting and removal in order to facilitate construction. The solicitation that the Government put forth specified what a good plan would entail and listed some alternative material to use in the blasting plan. The blasting was carried out in accordance with the contractor's submitted blasting plan. Over-blasting, or damage from using too much explosive, resulted from the contractor's plan. This over-blasting created additional debris, which required additional removal of material and correction of any damages. The contractor claimed that the Government warranted the blasting plan in

the procurement because it specified what a good blasting would entail and proffered alternative material to use.

The Court held that even though the Government specified what a good blasting plan would entail, it left the contractor open to decide the blasting plan and what would be entailed in carrying it out. Furthermore, during performance, the contractor was free to deviate as necessary from his own submitted plan. The Court cited the contractor's intimate knowledge of the plan as proof. The Government, even though it specified what a good blasting plan would entail, did not warrant the plan as a design specification. The Court further stated that, "the warranty of alternative methods, as contemplated in these cases, should not be imposed if recovery is founded on a non-specific performance-type specification that affords significant latitude or discretion." [Ref.19]

i. Summary of Disputes and Protests involving a mix of performance and design specifications

The above cases came from GAO protests, ASBCA Disputes and CoFC actions. While the stages for the protests or disputes differed greatly, the underlying theme of the cases remained the same. That being, when a Government agency uses a mix of performance and design specifications to accomplish contractual goals, it can potentially open itself up for protests, disputes or non-performance.

In some cases, such as highly technical procurements, the use of design specifications might be warranted. However, in routine and regular procurements it is preferable to use only performance specifications. In each case above, the Government could have achieved the

goal of the contract by solely citing performance specifications and not mixing in design specifications. The source for trouble in each case was when design specifications failed to meet requested performance. A significant lesson for the contracting officer to take away from these cases is that when using performance and design specifications, ensure that a given design will meet the requested performance and ensure that the warranty is not implied or guaranteed through the design specifications.

2. Protests and Disputes Involving the use of Commercial Performance Specifications in Contracting

In Chapter II, the researcher specified how the use of performance specifications came to the forefront of acquisition strategies through a decision memorandum issued in July of 1994 by then Secretary of Defense William Perry. The specific wording of Secretary Perry's memorandum states that Defense Agencies will use "performance and commercial specifications and standards in lieu of military specifications and standards unless no practical alternative exists to meet the user's needs." [Ref. 9] The old non-preferred method would be to draft new design specifications that would clearly prescribe the requirements. Now, with the new changes, contracting officers and potential contractors are free to use published and readily available commercial specifications.

The case presented below represents common issues when commercial specifications are used. First, there is an issue of the published performance specification possibly being proprietary. Frequently, respondents will copy published commercial technical descriptions from brochures and pamphlets and apply their own letterhead while

responding to solicitations. These companies may not have the authority to use the commercial descriptions. Second, there is an issue of completeness. Commercially drafted specifications and standards might not be as complete as required by the solicitation or they may contain errors, causing a non-responsive decision on the part of the Source Selection Authority (SSA). Both of these issues can have a negative effect on competition and on completing a necessary procurement.

First, there is a potential for abuse. Contracting officers must avoid any chance of becoming embroiled in litigation due to marketplace competitor's use of each other's proprietary information. When that information is then used to gain an unfair advantage, litigation and delay of contract award can result. Second, in a rush to respond, respondents will use published specifications that might contain errors. Again, if the respondent is judged as non-responsive, a protest and delay of contract award will result. The following cases expound upon these themes.

***a. Matter of: Daniel Technology Incorporated.
B-288853, December 13, 2001***

In this case, the Government procured a modified Sony mini-disk recorder. The winning respondent submitted the competitor's published technical performance specifications in his proposal. The Government received a protest because it accepted the use of the protestor's own performance specifications in a proposal from a competitor. While the petitioner admits that his performance specifications were not proprietary, he also claimed that he knew the competitor could not perform without his

equipment, which he had no intention of providing. In other words, the winning contractor could not achieve successful performance without the protestor's equipment.

The GAO held that while the performance specifications might be the same, the competitor was rightly awarded the contract and now must perform. The specifications in this case were commercial performance specifications that were used in a response to a Request for Quotation (RFQ). Commercial specifications were used because the Government requested a modified commercial item in response to its solicitation. The GAO held that merely submitting a photocopied public specification page can constitute adequate technical submission in response to a solicitation, regardless of whose letterhead is at the top of the page. However, the submitting contractor must accept the risk that he could be excluded from competition due to non-responsiveness or errors in the public specifications.

b. Summary of Protests and disputes involving the use of Commercial performance specifications

The case above represents what can happen when respondents provide commercial performance specifications in response to solicitations. While contractors are urged to use commercial specifications in lieu of specially drafted and more cumbersome specifications, their use can cause conflicts in the area of competition and innovation.

With competition, contracting officers might see the same commercial specifications on many proposals, thus taking away a valuable tool for distinguishing between proposals. Additionally, with the acceptance of "off-the-shelf specifications", contractors are not incentivized to

become innovative and improve upon old designs. The Government potentially loses a technical diverse response to proposals. There might be an initial savings because the contractors do not have to draft new approaches, but the Government loses the benefit of new processes and concepts.

3. Protests and Disputes Involving Poorly Written Performance Specifications

Performance specifications have existed for some time in Governmental contracting, however, their mandated use has only been since June 1994. With the changes came a new demand that contracting officers draft clear, concise and non-design oriented performance specifications. While the concept sounds rather elementary, actually being able to describe requirements in a performance oriented method is rather difficult. Many tools, both automated and manual are available to the contracting officer and program manager to draft a complete performance specification (these tools will not be examined in this thesis). As with all changes, time, experience and evaluation of lessons learned provide direction to those drafting performance-oriented specifications.

a. Matter of: Signals and Systems Incorporated, B-288107, September 21, 2001

This case involved the procurement of electrical engine starting systems (ESS) for the Army's HMMWV (pronounced Humvee). The HMMWV is a four-wheel drive, lightly armored, all-terrain tactical vehicle used for troop transport and command and control. In this case, the requirement for the use of performance specifications in all procurements was taken advantage of and used to stall a timely competitive procurement action.

When the original problem with the ESS was discovered, the Army initiated a small acquisition to purchase enough ESS to meet the immediate needs for replacement. The first purchase was handled as a sole-source urgent requirement. Later, the Army realized its need for additional ESS and again initiated a sole-source urgent procurement. The procuring agency had direction to use a performance specification for, and competitive award for, the next contract. However, the Army stalled the drafting of a performance specification for nearly two years, forcing sole-source procurement for ESS.

The GAO concurred with the protestor that the dragging on of drafting the performance specification led to the situation of *extremus*. The GAO in this case found that "the Army failed to timely and diligently prepare the performance specification and that this resulted in the noncompetitive procurement." [Ref. 20] Additionally, the GAO held that, "Contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a noncompetitive position where they could reasonably take steps to enhance competition." [Ref. 20]

It is important to note that the GAO also stated, "We have held that military mission readiness and personal safety are important considerations in judging the reasonableness of an agency's determination that unusual and compelling urgency prevents the agency from conducting procurement on the basis of full and open competition, as provided for by CICA." [Ref. 20] However, the delay in this case was an abuse of competition requirements blamed on the

delay in drafting a performance specification. Drafting of performance specifications was never meant to be an onerous task. In this case, with an established system already fielded, the performance specification should have been extremely easy to write. This case represents an abuse of the new requirements in order to achieve an urgent need for a supposed exigent requirement.

***b. Matter of: Ellicott Engineering
Incorporated, B-282382, June 23, 1999***

This case involved the purchase of dam gate chains. The protester substituted material called for in the solicitation for another material that would meet the performance specification. The central reasons behind the use of performance specifications were to encourage innovation and reduce costs associated with procurements. In this case, the contractor responded to a proposal with an alternative material that was not specified in the description. The new material was not known to conform to stated performance requirements. The contractor maintained that it was the Government's responsibility to prove non-conformance and not the contractor's. The GAO held that, "A bid must be responsive to be considered for award, which means that the bid submitted must offer to perform, without exception, the exact thing called for in the IFB, and, upon acceptance, will bind the contractor to perform in accordance with all material terms and conditions of the IFB." [Ref. 21]

The GAO found for the Government and denied the protest. The GAO noted that performance requirements do not allow wholesale substitution of material, and that contractors are still required to submit bids that are

responsive to the proposal. "With regard to Ellicott's argument that its substituted material would satisfy the performance requirements of the specification, the cited provisions put the burden on the contractor (not the Government) to provide sufficient evidence that the proposed substituted material was acceptable." [Ref. 21]

***c. Matter of: Chadwick-Helmuth Company
Incorporated, B-279621.2, August 17, 1998***

This procurement involved the purchase of a computer power supply that operated in several different pieces of aircraft vibration test equipment. The performance specification in this case asked for 100% compatibility with other systems and software that were integrated with the hardware. In reality, only one company would be able to satisfy the requirement and that was the incumbent contractor. The overly restrictive performance specification stifled any competition and led to the protest being sustained, and the requirement being reprocured with more descriptive and less restrictive performance specifications.

The performance specifications were found overly restrictive due to a need for integration with existing hardware and software within a system. However, the Government went too far in drafting the specifications out of a fear that it would not get what it was trying to procure. When writing performance specifications, it is important to clearly state what is needed and what the requirements are, but not be overly restrictive in requirements. If a new contractor is able to bid on the proposal, then the goals of competition have been met. The need for full and open competition needs to be balanced

with the requirement to use performance only specifications.

d. Matter of: Caswell International Corporation, B-278103, December 29, 1997

The material being procured in this acquisition was targetry equipment. This equipment was intended for use in a forward deployed and operational environment in Korea. Its interoperability and functionality was essential to the success of the mission. The use of a restrictive performance specification was necessary to ensure that the Government received exactly what it was asking for. While this case represents an extreme situation, it also demonstrated a situation where it may have been necessary to seek justification for restricting competition and using overly defined performance specifications.

In comparison to the preceding case, this case appears contradictory. This case represents the same situation as above where an overly restrictive performance specification stifled competition. However, the GAO determined that the restrictions were for safety and deployment requirements. The material being procured had no other choice but to be 100 % interoperable with existing systems. The GAO held that, "where a requirement relates to national defense or human safety, as here, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest level of reliability and effectiveness." [Ref. 22]

e. Matter of: Henschel Incorporated, B-275390.5, May 14, 1997

In this case, the Defense Logistics Agency competed the purchase of a digital airflow panel. The Government used a performance specification to delineate technical requirements and specified, "brand name or equal" for the procurement of the panel. The winning bidder submitted commercial, technical specifications to meet the requirements of the solicitation. The protestor was the incumbent contractor, who protested on the basis that the competing airflow panel did not meet the same technical and performance standards as his airflow panel. Additionally, the incumbent contractor claimed that the winning contractor's panel would not operate with his already installed sensors. The GAO held that:

An agency may properly express its needs by specifying a particular product and affording other firms an opportunity to submit offers for alternate products where, as here, the agency has insufficient technical information to more adequately describe its requirements. Using this method of describing its needs, agencies may not relax a solicitation requirement that an alternate item be physically, mechanically, electrically, and functionally interchangeable with the named product. This means that an agency does not have the discretion to accept an item that is not interchangeable with the named item based on a finding that it otherwise satisfies the agency's minimum needs. The obligation to demonstrate the acceptability of an alternate offer is on the offeror, and consequently an offeror must submit sufficient information to enable the agency to evaluate its alternate product. [Ref. 23]

A review of the technical specifications submitted revealed that the two filters were not identical

or even fit the criteria for "brand name or equal." When using existing commercial specifications to specify performance, it is imperative to receive sufficient technical information for all respondents to clearly evaluate the proposals. This requirement should be specified in the solicitation.

***f. Matter of: Overstreet Electric Company
incorporated, Case# 51823, September 28, 1999***

This case involved a construction contract for the renovation of manholes and electrical cables at Wright-Patterson Air Force Base. While this case had multiple claims, there was only one claim that dealt specifically with performance specifications. The particular performance specification in this case was not clear in specifying that installed switch gear should be made operational and tested as well as installed.

While the ASBCA denied the protest based upon interpretation of the parties to the requirements of the contract, a key lesson from this case is that performance specifications should be adequately clear to preclude multiple interpretations. The ASBCA specifically noted that, "Appellant's interpretation of the contract is unreasonable. It is black letter law that in establishing reasonableness a party must establish that its interpretation gives meaning to, and harmonizes all relevant provisions, with the effect of not rendering any relevant term superfluous or nugatory." [Ref. 24]

Installation specifications should include a provision to make a system operational and, if necessary, perform tests. The ASBCA further noted that, "An ambiguity does not result merely because the parties interpret the

contract differently, but only if it is susceptible of two different interpretations, each of which is consistent with the contract language." [Ref. 24]

g. Matter of: FSEC Incorporated, Case# 49509, July 28, 1999

This case involved an appeal of the COFD denying the contractors request for equitable adjustment. In that procurement, the Navy contracted for the construction of a painting and blasting facility. Once again, the issue of interpretation of performance specifications and the ability of the contractor to perform to the stated requirements was called into question. The specific issue in this case was whether the contractor was free to deviate from installing a particular number of exhaust fans, as requested by the Navy, as long as performance requirements for airflow were met. The ASBCA ruled as follows:

...an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous, nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). [Ref. 25]

The ASBCA further stated that, "Appellant's interpretation of the contract at issue in this case is not reasonable because it excludes contract provisions, creates conflicts between unambiguous contract requirements, and renders contract specifications and drawings superfluous." [Ref. 25] The Government is entitled to get what it contracts for, but in this case not being explicitly clear

caused a dispute that required settlement outside of the agency and led to poor contract performance.

h. Matter of: Tom Shaw Incorporated, Case# 28596, January, 18 1995

The core cause of this dispute was the use of a slurry mix for the constructions of a trench wall. The performance specification stated that, "The slurry shall consist of a stable colloidal suspension of pulverized natural sodiumcation bentonite and cement in water or other combination of impervious mix." [Ref. 26] In this case, the contractor chose to use soil back-fill rather than cement and bentonite slurry. The contractor was fully prepared to demonstrate performance and adherence to contract requirements.

In its review, the ASBCA entered the following comments regarding the use of performance as design specifications:

A design specification is one which sets forth precise requirements, such as the manner of performance, measurements, materials, and quality control and inspection requirements. When contracting with such a specification, the Government bears responsibility for specification errors and omissions. By contrast, a performance specification sets forth an objective or performance standard to be achieved and the contractor is expected to select the means of performance and to bear responsibility for the method selected. See, e.g., *J.L. Simmons Co. v. United States*, 412 F.2d 1360 (Ct. Cl., 1969). Many specifications, however, contain both design and performance characteristics, leaving each of the parties bearing risks which must be sorted out in the event of a dispute involving the adequacy of the specification and performance.

The parties agree that the specification in this contract contains elements of both design

and performance specifications. There are also strong indications that the Government was not really aware of the extent of the latitude which the specification, as it appears in the contract, permitted bidders, and the Government's reaction upon becoming aware of that reality was, at least in part, the cause of performance difficulties and delays. [Ref. 26]

The Government stopped all work on the project, which caused additional costs to the contractor, while the issue of the slurry was resolved. The dispute occurred because the performance specifications contained both design and performance aspects and it was poorly written. The specifications should have been better written to preclude a different slurry mix if that was what the Government wanted. The contractor performed in accordance with the contract and was awarded damages for work stoppages.

i. Summary of Disputes and Protests involving poorly written performance specifications

The above cases demonstrated the problems that can occur when performance specifications are poorly written, are overly restrictive or lacking in specificity. The line between performance specifications and design specifications can sometimes be unclear. The contracting officer must at all times be aware that he will only get what he asks for and if the requirements are not specific to the average reader, then the result might not match the intent.

4. Special Case Demonstrating Combination Of All Major Themes

The case described below is a special exception to classification in one of the three categories because it contains elements of all three. In this case, the

Government contracted for the manufacture of a coal crushing machine to crush a coal stockpile into useable size pieces of coal. The Government made many errors and violations in this case, but for purposes of this thesis, only items dealing specifically with performance specifications are presented.

***a. Matter of: ABS Baumaschinenvertrieb GmbH.,
Case# 48207., August 29, 2000***

This case demonstrates the use of performance specifications and the contracting process gone awry. As the ASBCA specifically cited, "this termination for default exudes an odor piscatorial." [Ref. 27] In this case, "The contracting officer terminated the contract for default because, according to the Government, appellant manufactured and attempted to deliver a coal crushing machine which did not meet the Government's design and performance specifications. Appellant contended that it was not in default because its machine met the performance requirements of the specifications, and further, that the design portion of the specifications was defective." [Ref. 27]

First, the specifications for a coal crusher contained both design and performance aspects. The design in this case would not match the requested performance for the size of coal wanted. Numerous experts would evaluate the design, as solicited by the Government, and concur that the crusher would not meet requirements. Through numerous design changes, the winning contractor was able to design a crusher to meet requirements, but the Government rejected the eventual design.

Second, the specifications as used were from a commercially available coal crusher that was developed by the contractor assisting in the development of the proposal. The Contracting Officer specifically said that, "the specifications had been prepared on the basis of the brochures from different possible sources for the coal crushing and screening plant that he had received from his market survey to determine what was available on the market." [Ref. 27] He further represented that "since all coal crushers are standardized and meet the Government's needs, he did not cite a brand name and prepared the design on the salient features required to get a maximum competition." [Ref. 27] These statements would prove to be false as the crusher design and specifications were taken, almost verbatim, from a competing offeror's technical descriptions.

Lastly, the specifications were so poorly written that the contractor was left to his own devices to decide exactly what was required. In responding to a show cause letter, the contractor submitted that:

...a machine manufactured in accordance with the specifications, with the components dimensioned as specified, would not efficiently produce the performance requirements set forth on page two of the specifications, and that the machine which appellant designed and proposed to have tested would satisfy, and indeed exceed, those specified performance requirements. Appellant further repeated its earlier offer to deliver the coal crushing machine with wheels rather than skids and with the motor with increased power, and to test the coal crushing machine to the specified performance requirements in accordance with paragraph 3.7 of the

specifications without any obligation on the part of the Government. [Ref. 27]

In its findings, the ASBCA dealt with the issue of performance specifications in the following paragraphs:

Contrary to appellant's contentions, the specifications were not performance specifications with design guidelines. Rather, they contained a mixture of performance and design specifications. However, as we found above, the specifications were defective in the following respects: First, the dimensions of the components were based on Fa. HAZEMAG product line items and Fa. Haverand Boecker screening plant. Second, the Fa. HAZEMAG initially proposed specification containing the dimensions for the conveyor belt and screen exceeded what was required for the capacity requirement specified in the performance portion of the specification. Third, the specifications did not include the drawings prepared by Fa. HAZEMAG required for the depiction of the required arrangement and assembly of the components. Fourth, although the English language version of the specification controlled, there were omissions in the German "courtesy translation" of the specifications that were contained in the English language version that defined inspection and acceptance requirements, the performance standards, and the testing to ensure satisfactory functional and operating efficiency of the plant. Fifth, there was a conflict between the design and performance requirements of the specifications. Thus, a machine manufactured and assembled in strict compliance with the specifications contained in the IFB would not, according to standard industry mathematical formulae, have met the performance requirements specified in those specifications.

Since the Government rejected testing of appellant's tendered coal crushing machine and screening plant, the Government has not proved that appellant's coal crushing machine would not have satisfied the performance requirements of the specification. [Ref. 27]

This complex case alone clearly demonstrates the extreme misuse of performance specifications. As the ASBCA again stated, "As stated in *McQuagge v. United States*, 197 F. Supp. 460, 461 (W.D. La. 1961), 'this case presents a disgusting example of bureaucratic incompetence, irresponsibility, negligence, and outright disdain for the Government's interests, in connection with' this DM 675,000 contract for a coal crushing and screening plant for the Rheinau Coal Yard, Germany" [Ref. 27]

C. SUMMARY

The cases analyzed above have demonstrated the results of what can happen when specifications are not clear or do not match exactly what is required. The three reoccurring themes discussed above were:

- Cases in which performance specification and design specifications were used and in which a protest or disputes occurred due their use
- A single case in which the use of readily available and published commercial specifications was used in a bid and that use resulted in a protest.
- Case in which the performance specifications were poorly written so that they were overly restrictive or unachievable.

In some cases, overly restrictive specifications are acceptable as long as the justification matches the restrictions. In many cases, it is necessary to mix performance and design aspects in specifications. This can be appropriate when required, but should be avoided due to warranty concerns. Finally, using "off-the-shelf"

specifications may be easy, but their use may also cause protests and disputes, which in the end could be more costly than taking the time to write a good performance specification.

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V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

This chapter outlines conclusions, answers to primary and secondary research questions and makes recommendations for the use of performance specifications in performance based contracting. Each research question will be presented and answered in turn with a brief discussion following. Finally, potential areas for further research or examination are presented.

B. ANSWERS TO RESEARCH QUESTIONS

As delineated in Chapter I and examined in subsequent chapters, the researcher set forth to answer specific research questions regarding the results of the use of performance specifications in Federal contracting. The answers to these research questions are presented below.

1. Primary Research Question

In what ways has the use of Performance Specifications resulted in contract protests, disputes and litigation in Federal contracting, and how can these decisions and rulings be used to eliminate problems with using performance specifications?

An analysis of GAO, ASBCA and CoFC cases since January 1995 yielded a trove of information and lessons learned in the use of performance specification in Federal contracting. Performance specifications have caused protests and disputes when their use has been improperly used with design specifications; improperly used in conjunction with commercial specifications; and improperly written to preclude a coherent interpretation of Government requirements or intent. A closer examination of these

points is made in the discussion of the secondary research questions.

Using these decisions and rulings, acquisition managers, contracting officers and program managers can benefit from the mistakes and missteps that their peers have made in past procurements. Additionally, the written rulings from these bodies contain interpretation of regulations and historical background of precedence cases that can lead the acquisition professional into the proper use of performance specifications. Not only do these rulings contain direction for the improper use of performance specifications, but they also contain a road map of acceptable use of performance specifications.

2. Secondary Research Questions

a. What is the background and history of the directed use of performance specifications and standards?

Chapter II outlined the background and history of the directed use of performance specifications in Federal Contracting. While the concept of performance specifications has existed since the formalization of the Federal Contracting process, its directed use has only come into existence with the policy memorandum issued by Secretary of Defense William Perry in July of 1994. The driving factors of the direction from Secretary Perry were to facilitate cost-savings and encourage innovation from the marketplace.

b. Does there exist a commonality or trend in the protest and litigation of cases associated with using performance specifications? If so, what are the commonalities or trends?

Through the case review conducted in Chapters III and IV, there were three recurring themes found in all the cases relating to the particular use of performance specifications. While the recurring themes were presented in Chapter IV, they are re-presented here:

- First, there were protests, disputes and claims initiated when performance specifications and design specifications were mixed in the definition of requirements. Specifically, protest action was generated when the stated performance requirements could not be achieved concurrent with the stated design requirements.
- Second, there were protests, disputes and claims initiated when performance specifications were used in conjunction with published commercial specifications. Specifically, actions were initiated when respondents to solicitations used readily available commercial specifications to meet the requirements of the solicitations or when commercial specifications were used to define Government requirements in a particular solicitation. The particular case (protest or dispute) occurred when the

commercial specifications did not fulfill the original intent of the solicitation according to the user or customer.

- Third, there were protests, disputes and claims initiated when performance specifications were poorly written and did not adequately define the requirements of the Government. Specifically, actions were taken when the performance specification was subject to multiple interpretations, overly restrictive to competition or failed to define the real requirements of the Government.

c. What recommendations for changes can be made to enhance the use of performance specifications and standards in Federal contracting?

First, it must be stated, that the use of Performance specifications seems to have relatively few problems in Federal Contracting. The small population of cases found attests to the successful implementation of this concept in the acquisition process. While even one case causes a significant expenditure of resources to be dedicated to its resolution, having only 18 cases in the five year period examined represents an extremely successful change in the contracting process.

Any new changes to the current process needs to focus on making contracting officers successful in writing performance specifications and in drafting the solicitation and contract requirements. In some of the examined cases, the acquisition managers were attempting to comply with

directives, but lacked the necessary expertise to successfully write a performance-based requirement in harmony with those directives. Standardized training and centralized reference resources would significantly enhance this process.

There should be more published guidance on the use of commercial specifications in response to solicitations. This guidance should be published and distributed in a manner that makes it readily available, easily understood and able to be applied in varied circumstances. Currently, contractors are free to respond to solicitations with technical performance lists published by manufacturers regardless of whether they might be the original equipment manufacturer or not. The Government directed the use of performance specifications to encourage innovation and to capture some of the technological diversity of the marketplace. Some of this goal is dissipated when "off-the-shelf" performance specifications are used in solicitations and proposals when multiple bidders/offerors offer the same item.

A more open environment of communication and industry involvement might have avoided some of the cases in the previous chapters. If industry was allowed to preview requirements and the drafting of performance specifications, the experts in the industry might have been able to filter out non-accomplishable or non-achievable requirements. Of course, this exchange would still have to remain within the bounds the FAR and any DFAR or agency directive.

Lastly, a significant impediment to successful use of performance specifications is when performance specifications and design specifications are used concurrently to define a requirement. The Government acquisition manager needs to understand that when design and performance are specified, performance must be achievable with the stated design. A better approach, only when the complexity of the acquisition allows, would be to solely use performance specifications. In the event that the Government cannot rely solely upon performance specifications (due to regulatory requirements, program requirements or technical complexity) all design specifications should be carefully reviewed by both Government and contractor engineers to ensure achievability and adherence to performance requirements.

C. CONCLUSIONS

In answering the research questions above, the following conclusions were made:

1. The mandated use of performance specifications has been fairly successful in the Department of Defense and across other Feral Agencies.
2. There were only a small percentage of protests, disputes and litigation cases actually heard through the respective processes mentioned above.
3. When cases were heard, there seemed to be an even split between the Government actually winning the case and the contractor having his protest or dispute upheld.

4. Mixing of design and performance requirements is a risky endeavor, and the Government might be in a position of warranting the design to achieve stated performance goals.

D. RECOMMENDATIONS

Through the research conducted in the previous chapters the following recommendations are suggested:

1. Defense Acquisition University (DAU) or Defense Systems Management College (DSMC) should develop training courses focused on developing performance specifications. These courses should be included as a requirement in Defense Acquisition Workforce Improvement Act (DAWIA) Level II Acquisition and Contracting Certification.
2. Continue the development of automated tools for drafting performance specifications that are readily available on the Internet or via other means to Contracting Officers for use in drafting IFBs, RFPs, RFQs, contracts and other documents. (Although not discussed in this thesis, one automated tool: Turbo SpecRight! was found to be a good aid to writing solid performance specifications. [Ref 28.]) Automated tool can serve as a guide or roadmap only and should not be considered a panacea for involvement by both Government and contractor in the contracting process.
3. Each designated Head of Contracting Agency should publish specific guidance on the use of

published (via brochures, pamphlets, catalogues) performance specifications. This use should be limited only to situations in which the commercial item is in fact the best responses (determined by full and open competition) to a solicitation. Published guidance should be directed at Government and contractor personnel.

4. The combined use of performance specifications and design specifications should be discouraged unless in-house engineering can firmly establish that the specified design will meet performance, or unless it is absolutely required due to the complexity of the requirement.

E. SUGGESTED AREAS FOR FURTHER RESEARCH

The following areas of additional research are offered:

- First, the scope of this thesis was limited to examining situations where the use of performance specifications was problematic in the acquisition. A future study might focus solely on the success and innovation use of performance specifications in major acquisitions.
- Second, cost benefit analysis was not performed in this thesis. A future study might focus on the cost savings and cost avoidances that have been achieved in the

use of performance specifications and performance based contracting.

- Third, while the existence of tools that assist in writing performance specifications was mentioned, no comprehensive listing and analysis of these automated and manual tools was performed. A future study might focus on these automated and manual tools and examine their benefit to the acquisition community as a whole.
- Lastly, the use of performance specifications has been limited to relatively small acquisition programs with only a small number of large acquisitions using an approach of sole performance specifications. A future study might focus on any large acquisition program and evaluate the use of performance specifications in large complex procurements of weapons systems.

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LIST OF REFERENCES

1. Armed Services Board of Contract Appeals, "Charter", <http://www.law.gwu.edu/asbca/charter.htm>
2. Armed Services Board of Contract Appeals, "Rules", <http://www.law.gwu.edu/asbca/rule.htm>
3. Dobler, Donald W. and David N. Burt, *Purchasing and Supply Management*, The McGraw-Hill Companies, Inc., 1996.
4. *Defense Acquisition Desk Book*, Version 3.5, Wright Patterson Air Force Base, OH, Spring 2001
5. *Federal Acquisition Regulation*, U.S. Government Printing Office, January 1, 2001.
6. Hoffman, Scott J., *Analysis of Armed Services Board of Contract Appeals, General Accounting Office and Federal Court of Claims Decisions on Best Value in Federal Procurement*, Master's Thesis, Naval Post Graduate School, June 2001.
7. Lord, Roger D., *Analysis of Contract Disputes resolved by the Armed Services Board of Contract Appeals (ASBCA) Between January 1998 and June 1999*, Master's Thesis, Naval Post Graduate School December 1999.
8. Nash, Ralph C and Schooner, Steven L., O'Brien, Karen R., *The Governments Contracts Reference Book, Second Edition*, The George Washington University, Washington D.C., 1998
9. Perry, William J, *Memorandum for the Secretaries of the Military Departments: Specifications and Standards - A New Way of Doing Business*. June 1994
10. Poteet, Thomas L., *Benefits, costs and risks of converting from military design specifications to commercial performance standards at a commercial laboratory*, Master's Thesis, Naval Post Graduate School June 1999.

11. Whelan, John W, *Federal Government Contract: Cases and Materials*, The Foundation Press, The Foundation Press, Inc., 1985.
12. *United States v. Spearin*, 248 U.S. 132. Supreme Court of the United States. 1918.
13. *Appeal of Stemaco Products, Inc. Armed Services Board of Contract Appeals*. ASBCA No. 51599, August 20, 2001.
14. *Appeals of M.A. Mortenson Company Armed Services Board of Contract Appeals*. ASBCA Nos. 53062, 53063, 53064, 53065, 53122, August 17, 2001.
15. *Appeal of Edsall Construction Co., Inc. Armed Services Board of Contract Appeals*. ASBCA No. 51787, May 21, 2001.
16. *Appeal of Nomura Enterprise, Inc. Armed Services Board of Contract Appeals*. ASBCA No. 50959, November 15, 2000.
17. *Appeals of Poly Design, Inc., Armed Services Board of Contract Appeals*. ASBCA Nos. 48591, 49823, August 8, 1997.
18. *PCL Constr. Servs., Inc. v. United States, UNITED STATES COURT OF FEDERAL CLAIMS* Case Nos. 95-666C, 96-442C, September 20, 2000.
19. *Fru-Con Constr. Corp. v. United States UNITED STATES COURT OF FEDERAL CLAIMS*. No. 97-43C, October 30, 1998, Filed.
20. *Signals & Systems, Incorporated, Comptroller General of the United States*. No. B-288107, September 21, 2001.
21. *Ellicott Engineering, Inc. Comptroller General of the United States*. No. B-282382, June 23, 1999.
22. *Caswell International Corporation. Comptroller General of the United States*. No. B-278103, December 29, 1997.
23. *Henschel, Inc. Comptroller General of the United States*. No. B-275390.5, May 14, 1997.

24. *Appeals of Overstreet Electric Company, Inc. Armed Services Board of Contract Appeals.* ASBCA Nos. 51654, 51655, 51823, 51907, September 28, 1999.
25. *Appeal of FSEC, Incorporated, Armed Services Board of Contract Appeals.* ASBCA No. 49509, July 28, 1999.
26. *Appeals of Tom Shaw, Inc., Armed Services Board of Contract Appeals.* ASBCA Nos. 28596, 28720, 28872, 28873, 28874 37290, January 18, 1995.
27. *Appeal of ABS Baumaschinenvertrieb GmbH, Armed Services Board of Contract Appeals.* ASBCA No. 48207, August 29, 2000.
28. Turbo Streamliner, "Tools", <http://www.acq-ref.Navy.mil/tools/turbo/>

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